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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 356

H. S. OLIVER, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 357

C. P. SELLERS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals in both cases (R. 168–178) is reported in 121 F. (2d) 245.[1]

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[1] Petitioners filed separate appeals (R. 33–37, 37–40), but, pursuant to stipulation (R. 165–166), the cases were consolidated and heard together (R. 167–168).

JURISDICTION

The judgment of the Circuit Court of Appeals in each case was entered June 9, 1941 (R. 178). Petitioners' joint motion for rehearing (R. 181–190) was denied July 11, 1941 (R. 191). The petition for writs of certiorari was filed August 7, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in a prosecution for conspiracy to violate the mail fraud statute the evidence, instead of proving the single large conspiracy charged in the indictment, proved separate smaller conspiracies, and, if so, whether the variance prejudiced the petitioners in their substantial rights.

2. Whether the trial court abused its discretion in failing to exclude witnesses from the court room while not testifying, and, if so, whether petitioners were prejudiced.

STATUTES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the

parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 215 of the Criminal Code (U. S. C., Title 18, Sec. 338), insofar as pertinent, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

The petitioners herein were convicted under Section 37 of the Criminal Code (R. 29) and each sentenced (R. 30–31) to imprisonment for two years

and to pay a fine of $1,000 for conspiring to violate Section 215 of the Criminal Code, known as the mail fraud statute. The court below affirmed the judgments and sentences (R. 178).

The indictment (R. 3–18), which contained one count, charged that from March 9, 1937 to March 14, 1940 the petitioners and 24 other named defendants [2] conspired together and with each other to use the mails in furtherance of a scheme which they had devised to obtain money by selling, through false pretenses and representations, oil leases on lands owned by the State of New Mexico (R. 4–8). The fraudulent means by which the defendants carried out the scheme were set forth at some length (R. 5–8) and nine overt acts in New Mexico were alleged specifically (R. 8–17).

The evidence, so far as here pertinent, shows as follows:

During 1937, 1938, and 1939, the defendant Dorothy Heard was a lease broker actively engaged in purchasing for subsequent assignment leases of so called "open" or "wildcat" lands owned by the State of New Mexico and leased through the State

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[2] Two of these defendants were tried and convicted along with the petitioners (R. 29–30). The case against 9 of the remaining defendants was dismissed (R. 140). Seven of the others pleaded *nolo contendere*, 1 pleaded guilty, 3 appear to be accounted for as aliases of other defendants, 1 was not tried, and 1 appears to be unaccounted for by the record (R. 140–142). Heard, Goss, Aaby, and Dunlap, whose association with the petitioners was especially close, were among the defendants who pleaded *nolo contendere* (R. 140–141).

Land Office (R. 46–47). In February, 1937, being desirous of increasing her business, she arranged a meeting with three lease salesmen at which she asked them to interest other persons in selling leases and stated that high-pressure methods had to be used and that she would be glad to cooperate in sending them literature and in permitting them the use of her mail box in Santa Fe (R. 50–51). One of the salesmen present at the meeting was a man named Standefer, later convicted of violating the mail fraud statute in connection with the sale of New Mexico oil leases (R. 49). Another was the defendant Goss (R. 50, 140).

Subsequent to this meeting and within the period alleged in the indictment Goss and various of the other defendants, including the petitioners, usually working in combinations of two or three, sometimes with Standefer, and often under assumed names, by means of false pretenses and representations, sold lease assignments which were executed by Dorothy Heard and mailed by her to the purchasers (R. 67–68, 78, 87–88, 89–91, 93, 102, 115, 121–122, 123–125, 128–130). Among other combinations, Standefer and Goss (R. 52), Standefer and Goss and the defendant Aaby (R. 52–53), Goss and Aaby (R. 89–91), Goss and petitioner Oliver (R. 52), Goss and petitioner Sellers (R. 97–101), Aaby and petitioner Sellers (R. 87–89, 123–124), and petitioner Oliver and the defendant Dunlap (R. 107, 109, 114–115, 124–126) worked together in making sales.

During the period of the conspiracy each of the petitioners called upon and conversed with Dorothy Heard, as did Goss and Dunlap (R. 80–82), and Dunlap and petitioner Oliver, sometimes with Goss (R. 54), frequently got together with Standefer and "exchanged ideas on the type of *canbass* to work upon people" (R. 130–131). Heard corresponded with various of the defendants and cooperated with them in making sales by providing post office boxes and forwarding their mail giving petitioner Sellers and another defendant letters of introduction (R. 80, 82), and encouraging prospective purchasers to buy (R. 100. See R. 171).[3]

At the trial the court refused petitioners' requested instructions that, in substance, a verdict of not guilty was required if the jury found that there were several separate conspiracies among the defendants instead of the one general conspiracy charged in the indictment (R. 154–155).

ARGUMENT

The petitioners contend (Pet. 3–4) that certiorari should be granted for the reason that the case presents an outstanding example of abuse of the conspiracy statute and of an unfair trial. There

[3] These and other facts supporting the comment of the court below that Heard was "the clearing house for all of the defendants" (R. 171) are shown mainly by documentary evidence which is on file in the court although, pursuant to stipulation (R. 1–2) omitted from the printed transcript of record. See Plaintiff's Exhibits 24, 44–47, 69, 79, 80, 92, 93, 97–99, 101–108, 114–116, 141.

is no merit to this contention and no occasion for further review.

1. The principal claim of petitioners is that there was a fatal variance between the indictment and proof in that the evidence showed "not one general conspiracy between the defendants * * * but a multitude of smaller, different and disconnected ones" (Pet. 7). However, petitioners do not specify even one of this supposed multitude and it is clear from the references cited in the Statement (*supra*, pp. 4–6) that there was evidence from which the jury could have inferred that petitioners, through their connections with Heard, Goss, Standefer, Aaby, and Dunlap, were parties to the conspiracy alleged in the indictment. No formal agreement is necessary to the formation of a conspiracy and a person, to be a member of it, need not know its full extent or membership, it being sufficient that he knows its objects in a general way and participates in their furtherance. *Galatas* v. *United States*, 80 F. (2d) 15, 22–23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Marino* v. *United States*, 91 F. (2d) 691, 694–696 (C. C. A. 9), certiorari denied *sub. nom. Gullo* v. *United States*, 302 U. S. 764; *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

Moreover, even assuming that the proof did not show the conspiracy charged in the indictment, but separate small conspiracies, the variance would not

be fatal since petitioners were not prejudiced in their substantial rights. *Berger* v. *United States,* 295 U. S. 78, 81–83; *Marino* v. *United States, supra,* 698–699; *Martin* v. *United States, supra,* 494–495; *Kopald-Quinn & Co.* v. *United States,* 101 F. (2d) 628, 633 (C. C. A. 5), certiorari denied, *sub nom. Ricebaum* v. *United States,* 307 U. S. 628. As was pointed out by the Court in the *Berger* case, *supra,* the general rule that allegations and proof must correspond is designed to protect the accused against surprise and against a second prosecution for the same offense. The petitioners make no claim that they were in any way surprised or that the alleged variance exposed them to a second prosecution.

The contention (Pet. 7–8) that it was reversible error for the trial court to have refused petitioners' requested instruction (R. 154–155) that the jury should acquit if it found separate conspiracies is answered by what has been said. The requested instructions assumed that if the alleged variance existed it was fatal, whereas, as above shown, there being no prejudice to petitioners, it was immaterial.

Petitioners' final contention (Pet. 3–4, 8–10) is that they were prejudiced by the refusal of the trial court to exclude Government witnesses from the courtroom while not testifying. However, they cite no record references in connection with this

claim, including none to objections. While it is admittedly difficult to reduce any prejudice of the character asserted to the confines of a printed transcript, this difficulty emphasizes the wisdom of the rule that such matters lie within the discretion of the trial judge. We know of no circumstance which conflicts with the conclusion of the court below that the trial court did not abuse its discretion (R. 177–178).

CONCLUSION

The case was correctly decided below, there exists no conflict of decisions, and there is involved no important question of law. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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